IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

THE ESTATE OF MICHELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,	)	
Plaintiff,	)	
vs.	)	Circuit Court
	)	Case No. 0002-01376
PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon CORPORATION,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
Volume 41-A

BE IT REMEMBERED, That the above-entitled matter came on regularly for Jury Trial and was heard before the Honorable Roosevelt Robinson, Judge of tne Circuit Court of the County of Multnomah, State of Oregon, commencing at 9:00 a.m., Friday, March 8, 2002.

APPEARANCES:

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Mr. D. Lawrence Wobbrock, Attorney at Law
Mr. Charles S. Tauman, Attorney at Law
Mr. Richard A. Lane, Attorney at Law,
Appearing on behalf of the Plaintiff;

Mr. James L. Dumas, Attorney at Law,
Mr. John W. Phillips, Attorney at Law,
Appearing on behalf of the Defendant
Philip Morris, Incorporated and Defendant
Roths I.G.A. Foodliner, Incorporated;

ALSO PRESENT:
Mr. Herbert Pallant

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I N D E X

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DR. RICHARD CARCHMAN		4		

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MARCH 8, 2002; 9:00 A.M.

THE COURT: Good morning. Please be seated.

MR. PHILLIPS: Good morning, Your Honor.

THE COURT: Are we ready for the jury? Bring the jury, please.

(Jury in.)

THE COURT: All right. Good morning, members of the jury. Thank you. We are ready to proceed.

Counsel, you may proceed.

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RICHARD CARCHMAN,

was thereupon called as a witness on behalf of the Defendant and, having been first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION CONT'D.

BY MR. WOBBROCK:

Q Good morning, Dr. Carchman.

A Good morning.

Q Dr. Carchman, tell me if this sounds correct: There are maybe six dozen carcinogens shown in animal studies; maybe a dozen carcinogens shown in human studies. No one knows which and in which combination cause cancer in people. Does that sounds familiar?

A Yes.

Q You said that, didn't you?

A Probably more than once.

Q The testing that you talked about about market cigarettes, the biological testing, the programs that you are now instituting, some of them are only two to three years old, correct, sir?

A Some of them are only two to three years old; yes, sir.

Q Those have only been in place since the

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Master Settlement Agreement with the State Attorney Generals?

A If they are only two to three years old, then from a time perspective they are coincidental with that, but they are also coincidental with the Institute of Medicine report.

Q That's all a coincidence?

A No. You used the -- you used the point of reference in time to the Master Settlement Agreement. All I'm pointing out is there are other -- other events, at least from the scientific perspective, that are probably as important, if not more important.

Q Doctor, the experts in this country that talk about smoking and health include Dr. Burns?

A He's one of them, yes.

Q Dr. Benowitz?

A Yes.

Q Dr. Russell?

A Which Russell?

Q There is two Russells, isn't there?

A I think there are more, but which one?

Q The literature shows numerous articles by a Dr. Russell. Is one of those Dr. Russells involved in smoking and health?

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A I know a Dr. Russell who's involved in smoking and health from the United Kingdom.
Q And Dr. Dietrich Hoffmann?
A Yes, from the American Health Foundation.
Q A Dr. Kowlowski?
A Kozlowski.
Q Kozlowski?
A Yes.
Q And Dr. Ashton?
A Yes.
Q And numerous others?
A Oh, yes.
Q And you have heard that we have heard in this case from two of those doctors, Dr. Burns and Benowitz in this case?
A I have heard that they have testified, yes.
Q Have you read their testimony?
A No.
Q Have you been told by the lawyers what they testified to? In this case, sir?
A I'm thinking. I think I've had some discussion about it, but I'm not sure whether it relates to their specific testimony here or not.
Q In any event, sir, until the last three

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years, Philip Morris did not look at human disease in humans as caused by cigarettes. Would you agree with that?

A Directly?

Q Yes.

A That's correct; we did not directly look at human beings with regard to disease; that's correct.

Q Philip Morris never tested its cigarettes that it sold to people for biological activity?

A That's not true.

Q Cigarettes that are sold to people would be called whole products; would they not?

A By whom?

Q By anyone. You could call them a whole product?

A I have no idea what the word whole product -- if you are asking me about the commercial products that we sell, that's a term that means something to me. Whole products is -- is a term I have only heard in the courtroom.

Q Okay. But you have heard that question in a courtroom before, haven't you?

A Yes.

Q And you know what it means, don't you, as

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used in that sense?
A That's correct.
Q Okay. So whole product as used in the courtroom that you have heard before refers to the cigarettes you sell to people?
A That's correct.
Q Okay. Recall this question, this answer? "Whole product is actually taking a Marlboro, a real Marlboro cigarette that the company made, and really testing a real Marlboro cigarette for biological activity. That's what I mean. Answer: Okay. I have with 99.9 percent degree of assurance to myself that prior to approximately two years ago there was no biological testing by Philip Morris of its commercial product." Do you recall giving that testimony?
A When did I give that?
Q You gave that testimony on May 8th, 2001.
A Okay. I said 99.9? I have found in the millions of pages of internal Philip Morris documents that we have been referring to a report from 1966 or '67 in which Philip Morris tested three commercial products that it sold: A Marlboro, a Commander, Philip Morris Commander, and I think another product. And they tested it outside of

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Philip Morris in a laboratory. I didn't know the laboratory existed, but I found the report.

And they looked at mucous flow in cats, and they looked at respiration in mice. That's the first time I -- you know, because you all are asking me all these questions. So that 0.1 percent, 99.9 percent sure -- so I found -- I found an article from 35 years ago in which we actually tested commercial product. And my recollection of the data was that there was no -- no statistically significant biological difference between the two commercial products that were tested. There was no reference cigarette, as far as I can tell.

Q From 1989 until 1999 when you stopped as a full-time employee at Philip Morris, you were not aware of whole product testing for biological activity at the company, were you, sir?

A That's correct.

Q And this 1967 incident actually came to your attention through the lawyers in this case because Dr. Farone testified that there was a code sheet that disclosed that those tests were done in Europe; isn't that correct, sir?

A I think the tests were done at the

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University of Richmond in Richmond, Virginia.
Q But you found out about that because Dr. Farone testified about it in this case, and the lawyers told you about it?
A I think the lawyers showed it to me. I didn't know where it came -- where Dr. Farone had put that forth.
MR. WOBBROCK: Your Honor, I have a matter for the Court.
THE COURT: All right. We'll have the jury to step out, please.
MR. WOBBROCK: Ask the witness be excused.
THE COURT: We'll have the witness kindly step out.
(Jury out.)
MR. WOBBROCK: Your Honor, I hate to say this, but now we have got a serious problem. We've had the rule against witnesses in this case in place from the beginning of this case, and now we have defense counsel feeding exhibits and documents to the witness before they take the stand. And now the witness is incorporating that to rebut testimony that he's previously given in other cases. I think it's a clear violation of this Court's order, and I

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move that the entire testimony of this witness be stricken in its entirety for counsel's violation of the rules.

MR. PHILLIPS: Your Honor, this witness testified that he has not read any of the testimony of the former witnesses.

Let me start with a different perspective on this, all right? Why do we exclude witnesses? I don't actually know what the answer is to that document. So I, too, need to find what that is. I didn't show him that document. I don't know if he knew about it from a previous case, because Dr. Farone has been testifying repeatedly in deposition and so forth. I need to understand whether in this case or some other case he was shown that document. I can't answer that question. Okay.

I know he was not shown that testimony of Dr. Farone for purposes of responding to testimony in this case.

The important question is why are we excluding witnesses? We're excluding witnesses so they don't there their behavior based on testimony of other witnesses in this case. I would have like to have had the family members

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excluded so they didn't listen to the testimony and perhaps modify their testimony or complement it based on the nature of the cross-examination. That didn't occur. That's water under the bridge.

But it makes sense for Dr. Burns not to feed off Dr. Farone, Dr. Benowitz not to feed off a Dr. Burns and so forth, because you don't want those witnesses, for good reason, to be able to make those kinds of adjustments.

With respect to a defense expert witness responding to the testimony of an expert in the other case, you need to be able to provide some information as to what the target is in terms of what they are responding to. Experts always need to be able to look at and respond to what other experts have said for purposes of preparing their testimony.

Now, that's just the general point, Your Honor. I can tell I didn't give him the testimony. I certainly talked about the issues that I wanted to have him discuss for purposes of this case, and certainly some of those things that I wanted him to discuss are in relation to the testimony that I have heard.

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But that's why an expert is in the courtroom to be able to respond to and have as a point of reference the expert testimony of the other side.

I really don't know the answer with respect to this particular document. I know that I did not show it to them, and I know that he didn't read the trial testimony of Dr. Farone. And I can certainly inquire with respect to the witness. I can do it on the stand, if you want.

But it is just as likely -- although I don't know the answer to the question -- Dr. Farone was deposed two weeks beforehand. I mean, he has been deposed repeatedly in the last number of months. And I just don't know the answer whether or not he was -- became aware of that by virtue of other discovery in other depositions of Dr. Farone or the testimony he gave in this case.

But the point is what is really being served -- let's assume for a moment that he was shown that document as an exhibit that was shown in this trial. Let's assume the worst case, the one that Mr. Wobbrock has just posed.

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Experts need to be able to respond to what other experts are saying. That's the whole purpose of a trial and to have experts have as a point of reference the testimony of the other side or the points of view of the other side in order to be able to respond. And I think if we were having Dr. Carchman review the testimony of Dr. Whidby in order to be able to feed off of that, in order to be able to respond in cross-examination, that would be inappropriate. That's not appropriate, and we have not allowed any witnesses to do that, just as I hope they did not have Dr. Burns -- or Dr. Benowitz feed off of Dr. Burns and so forth. That's the purpose of the witness exclusion.

When you are talking about experts responding to the case the plaintiffs present, you need to provide them with that information in some form or another in order for the testimony to be responsive.

As I said, we did not give Dr. Carchman the testimony of Dr. Burns or Dr. Farone and so forth. Certainly, I have described to him the kinds of issues that I want to have him respond to, and certainly I was informed by that in the

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way that I heard testimony come in. I don't know how else to do that with a witness who is supposed to be responsive to the plaintiff's case, Your Honor. Again, I don't know what the specific document is and in what context he saw it.

THE COURT: What the Court would be concerned about, the Court is not concerned about you talking to your expert, saying "This Doctor's opinion is that."

MR. PHILLIPS: Right.

THE COURT: "How do you respond to a person making that opinion?" I see absolutely nothing wrong with that.

This expert witness' opinion is, A, how would you respond to that? What I would have some concerns about if there is a factual situation that your expert is not aware of. I'm not talking about opinion now. I'm talking about some factual testimony that this witness has given -- to give your expert that factual information -- not opinion evidence now -- that factual information that allows him now to change his testimony that he would not have changed had he not had that factual testimony.

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That's the purpose of excluding witnesses, is to keep one witness from actually being educated by another witness. But opinion, oh, no, no, you certainly have a right to say their expert said his opinion was A, B, C, D, what do you think about it? Do you agree with it? Can you attack it?

MR. PHILLIPS: Right.

THE COURT: "But he came up with an unique fact, and I'm going to share that fact with you," that, I feel to be inappropriate, because now you are giving him information that he doesn't have a right to, because that information only came -- unless you can show me that he received that information from another source other than from the witness' testimony, a specific unique fact. Because I remember what counsel had, they dug out something that they only got it because they found some type of code. And they, so to speak, broke the code. That's their only investigation to their benefit.

MR. PHILLIPS: This was the document that they introduced late and their -- that they had found on the web site and so forth? I don't

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know -- I frankly don't know where that document -- why Dr. Carchman knows about that document.

I do know that Dr. Farone has used that. The cross-examination of it was -- Dr. Farone told us about this document. I just don't know whether or not Dr. Farone has testified on that document in another context. I can't tell you. But I know the way this litigation works, Your Honor, is that these experts are deposed and in trial all the time, and they gather a tremendous amount of information from each other based on their trial testimony and expert testimony.

I can inquire of the witness. I can tell I didn't give him that document, but I don't know whether he had information about it based on previous depositions and so forth.

But let me -- let me step back from this particular incident for a second and just talk generally, because I do want to be candid with the Court about what our approach has been with respect to our experts. I have shared information about what it is I think that their experts are testifying to, what it is I think I

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would like them to be able to respond to. Okay? If there are exhibits on the party's exhibit lists, I haven't in any way limited my experts from reviewing those to the extent they want to for purposes of preparing for the case.

With respect to Dr. Larsen, for example, he is testifying with respect to all of the information that he has been able to gather regarding smoking and quit history. Okay. Now, he has reviewed the testimony in deposition as well as the family's testimony in this case in order to gather that information. That's classically what I would expect an expert to do.

It's not to try to modify his testimony. It's simply to gather whatever additional information came out in the trial testimony for purposes of making sure he has all of that information, which again to me is a classic function for purposes of an expert preparing for trial.

On this document, I just don't know the answer to the question. I can inquire of the witness with respect to it. But I can represent to you that whatever the consequence

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of that, he has not been prepared by giving him the trial testimony of other witnesses. I have only talked with him personally with respect to the substance of the testimony I have heard and what I would like him to be able to respond to. I can represent to the Court that is, in fact, the case. I can certainly inquire about the document. I don't know the answer to that question.

THE COURT: All right. Very well.

MR. WOBBROCK: Your Honor, may I be heard?

MR. DUMAS: Before you do, Larry, before you do, just for the record, Your Honor, I cross-examined Dr. Farone. I don't recall if he -- his cross-examination touched on this exhibit or not. I think not. I think it came up only in direct. In any event, I certainly never talked to Dr. Carchman about Dr. Farone's testimony or this exhibit.

THE COURT: All right. Thank you.

MR. PHILLIPS: I have some more information, Your Honor. I'm getting it on the fly here, so I hope I get this right. And I need to confirm it's the document that we're talking about. But before -- was it before

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trial? We were still in Seattle before trial. In talking to Dr. Carchman, he faxed that document to my colleague, Mr. Watkins, who I have just been chatting with. So this is before trial. So all I can say is if that's the case and we're talking about the same document, I'm confident the document wasn't shown to him because of it being introduced in this case.

Dr. Farone gave it to these individuals for purposes of trial, and he probably gave it to them because he has been using it in depositions and trials otherwise. That's probably why -- I can't tell you Dr. Carchman knew about it because he had done the search and found that document, but I am -- the lineage of this suggests he didn't know about it before the trial of this case. I can try to confirm that with him. We can ask the witness, himself.

MR. WOBBROCK: Your Honor, that's all very self-serving, but the problem is the witness just said under oath on the stand twice that he got the document from these lawyers in this case.

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MR. PHILLIPS: No, he didn't say that.
MR. WOBBROCK: Just a minute, counsel. I didn't interrupt you.
MR. PHILLIPS: Okay.
MR. WOBBROCK: Now, if they are going to try to spin that they got it from this fellow back here, Mr. Watkins, let's put him on the under oath and ask him some questions right now. If that's where they are going to say they got it from a lawyer in this case in Seattle before the case started, let's put Mr. Watkins on the stand right now under oath and put his bar ticket on the line and see what he says about that.
But this witness just said twice, "I got it from the lawyers in this case," and that's a factual matter that violates this Court's rule, and this witness' testimony should be stricken because of the misconduct of counsel. And they know it. And they are in a pickle right now, and they are trying to double talk their way out of it. And the facts are the facts.
He testified under oath twice, "I got it from the lawyers in this case."
Now, if they want to spin that to

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Mr. Watkins, let's put him up and see what he says.

THE COURT: All right. Let's do it this way: Taking the statement that you have just made, "I got it from the lawyers in this case," does not tell the Court the timing of which he got the document in this case. They could be true that he received the document in Seattle. I don't know.

First, I prefer to call the witness back on the stand and clear up the issue with the witness as to what he meant about what he said, because his testimony is the testimony that we're working with right now. Then once we get that, I will let counsel confer with his colleague in the back of the courtroom, and I will give them an opportunity to decide how they want to proceed on this issue. Because I don't think at this point in time we're in the position of putting anybody's license on the line. I don't think we're to that point. I think we're jumping through a lot of hoops before we get to that extent, because that's a very serious --

MR. WOBBROCK: I agree, Your Honor. This

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is all very serious.
THE COURT: -- very serious situation.
MR. WOBBROCK: Honor --
THE COURT: So let us try to get the facts.
MR. PHILLIPS: I'm happy to explore that.
THE COURT: -- out, and then from the facts, let's try to then go and see can we come up with some type of conclusion as to what happened, how it happened, why it happened and was there any impropriety, how the whole thing came together.
MR. WOBBROCK: I think the facts are out. If we could ask Ms. Keating to look to that transcript back then. He said it was produced by Dr. Farone in this case and given to the lawyers in this case. I think that has already been established.
THE COURT: I think we have that, counsel. But he didn't say when. That's what I'm missing right now. He didn't give a time when it was given to him. What I'm getting from the other side, there is a possibility that he came in contact with it prior to the beginning of the case. We don't have that issue fleshed out

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yet. That's what I'm saying. That has not been fleshed out.

MR. PHILLIPS: Your Honor, I agree. And I would like to find this out myself. I resent entirely the implications of pointing fingers in the courtroom at Mr. Watkins, who is simply trying to provide me with additional information. He's aware of what the witness told him. He both represented what Mr. Watkins told me. Mr. Watkins told me the witness told him about the document before trial when we came from Seattle. And I think the record will speak for itself, but I think you are absolutely right, there is no indication here that he got it as a result of Dr. Farone's testimony in this case.

MR. WOBBROCK: Quite the contrary.

MR. PHILLIPS: But let's remember this, Your Honor. I mean, I want to add here to the court's ruling. If we have made a mistake, then I'll up and apologize to the Court for it. But I don't think there has been one yet.

Let me just make this point clear though. The Court ordered the exhibits in this case to be identified before trial. We all agree that

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any of the experts could have reviewed those exhibits before trial at any time they wanted to. There is no question Mr. Wobbrock wants to put me in a pickle here, because he has heard the testimony of the witness. Its completely contradictory to some of his themes in this case. He doesn't want it in the case.

Let's just assume for a second that Dr. Carchman actually saw the document as a result of Dr. Farone's testimony. I don't know that's the case. We'll find that out through inquiry. But I want to put a context for the inquiry, Your Honor, because it may not be quite as serious as you are suggesting.

That exhibit, if it had been identified on the exhibit list, could have been seen by the witness at any time prior to trial. No one is suggesting that would have been a violation of any Court Order. The fact they actually delivered it late, that somehow makes it a violation of the Court's order? I mean, I don't know. I think that's for the Court to decide.

But it seems to me the context here and the spirit of the Court's Order was observed.

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I don't know the answer to the question. I want to find it out as well.

I'm not trying to conceal anything or spin anything. I would like to find that out myself. I'm encouraged by what I have been told by my own colleagues. Unlike Mr. Wobbrock, I actually believe them when they tell me something.

I think the witness should be put on the stand without the jury here to inquire and find out what the story is. And I would like to have an opportunity to inquire of him as well.

MR. WOBBROCK: Here's the problem, Judge, if I might -- and I think the question answers itself by the testimony that's already been given. If he said he got it in connection with this case, he had to get it after Dr. Farone testified, because it wasn't on the exhibit list until Dr. Farone testified, as counsel just admitted.

If he got it in connection with this case -- which he has testified to -- he couldn't have got it up in Seattle, because they claim that now they didn't know about it.

MR. PHILLIPS: Well, I think we need to

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inquire about that, Your Honor.

MR. WOBBROCK: No, he's already testified to that. Just a minute, counsel.

MR. PHILLIPS: All right.

MR. WOBBROCK: Instead of letting them go in and backfill.

MR. PHILLIPS: Well -- I'm sorry. Go ahead.

MR. WOBBROCK: I think the issue has already been joined. I think the evidence is before the Court. I don't think we're going to get anything now other than efforts to repair what is a very bad situation for them.

He admitted he got it in connection with this case. He couldn't have got it in connection with this case until the case started. Dr. Farone is the one who discovered the document on the Internet. They elicited testimony from Dr. Farone, isn't it true that sometimes you sit at home and punch in ten digit numbers, and you come up with whatever you can come up with -- maybe that's how he got it. They can make that argument. But he's the one that keyed us to it.

By the way, I would like them to provide

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me with a copy, because mine's back at the office, if we could, Your Honor.

MR. PHILLIPS: We don't have it, do we? We don't have the exhibit. It's your exhibit. It should be here though. It's introduced.

THE COURT: Ms. Murphy, would it in some of these documents up here?

THE CLERK: I'm sorry. I don't know which exhibit.

MR. PHILLIPS: This is the exhibit that would have been introduced in Dr. Farone's testimony.

Your Honor, he's just speculating at this point.

MR. WOBBROCK: The testimony is the testimony, Judge.

MR. PHILLIPS: Let me finish what I'm saying. Okay?

I think that -- look, I'm trying to be as candid as I can with the Court with the knowledge I have right now. And what I know right now -- this is not a hidden document. This is a document that was on the Internet. It's in Philip Morris' files. There are many ways that this witness could know about the

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document short of Dr. Farone testifying about it in this trial. They haven't even represented that he hasn't testified about this document in other cases or other depositions before this trial. That I suspect is exactly what happened and why he knew about it.

They are not standing up here and saying, "I know he's never testified on that subject before." If he did, then he's already shown the document to us in a previous context. And the only reason I'm suggesting that -- I don't know the answer to that question, but the way that he's posing it is we clearly have an intent of showing him this document in the context of this trial after Dr. Farone testified. I believe that is not the case.

And even if it were, Your Honor, I submit to you that the exhibit lists for both sides were available to both sides before trial. And the only reason that this would have been something that would have arisen during the trial and in the context of testimony would be because they provided a late exhibit. That would be the only potential crossing of a line because of a late exhibit being filed.

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THE COURT: I think that's what he's saying. I think he's saying that there is a potential that Dr. Farone only discovered this document after the trial had started when he was playing around with his computer --

MR. PHILLIPS: I think that's not the case.

THE COURT: -- punching in some numbers and got this document, so therefore it had not been presented as a potential exhibit.

MR. PHILLIPS: Right.

THE COURT: There. And so the only time it would have come to light would have been when he was on the witness and revealed that is what he had done.

Ms. Murphy, are you having any success in trying to find a copy?

MR. WOBBROCK: Judge, they should have a copy, because we gave them one.

MR. PHILLIPS: They have one.

MR. WOBBROCK: It's back in my office. I know exactly where it is.

MR. PHILLIPS: Let me confer.

THE COURT: All right. Certainly.

MR. PHILLIPS: The clouds may be clearing

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on this.
THE COURT: All right.
MR. PHILLIPS: I don't have the -- I would like to take a moment and just go back to the testimony we heard, Your Honor.
THE COURT: Go ahead.
MR. PHILLIPS: There was a reference by the witness in his testimony to a description of the document he became aware of, which allowed him to conclude this .1 percent that there was, in fact, an examination of a commercial product in 1967. And he mentioned the name -- was it Luchzinger -- what did he say?
MR. DUMAS: He said Commanders and Marlboro's.
THE CLERK: Chuck, we're looking at Plaintiff's Exhibit 2002. I don't know if this is the document or not.
MR. WOBBROCK: This is the one they introduced. Just give me a moment, Your Honor, I'm try to find the witness' testimony.
MR. WOBBROCK: This is it, Your Honor. We have got it. It's 2002.
THE COURT: 2002.

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MR. PHILLIPS: Can I see it for a second?

Well, let me read to you, Your Honor, what the witness said. I think we will get clarification on this from the witness.

What he said is, "I had found in the millions of pages of internal Philip Morris documents that we have been referring to a report from 1966, '67" -- this is '64, this is the document he's accusing us of handing the witness during trial. He's saying '66, '67. We may be talking about two documents -- "in which Philip Morris tested the commercial products that it sold, a Marlboro, a Commander, a Philip Morris Commander and I think another product."

There is no reference to Commander or anything else in this document. I think with appropriate inquiry, what we're going to find out -- he talked about mucous flow, and he talks about rats and mice. None of that is in this document. I think what he's talking about is a document that he found and which was sent to Mr. Watkins -- who would be happy to explain to the Court and doesn't need to be put under oath as an officer of the Court -- before we

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came to Seattle, which is another Philip Morris document from about 35, 36 years ago, which actually did test a commercial product.

So I think you have got a description of a document here -- I mean, I'm trying to surmise what's going on here myself, Your Honor. But you have got a description of a document on testimony here from 1966 or '67 relating to a Commander or a Marlboro relating to mucus flow, et cetera, that's not this document, the one that Mr. Wobbrock introduced late and I believe Dr. Farone testified to. And then you have this document, which is about Tareyton Lark and Marlboro. Again, I'm just reading through it. It doesn't appear to be anything to do with mucus flow -- there is mucous flow tests on the second page. So I think the witness needs to be given a chance to identify whether he's talking -- and also -- let me ask this question.

(Discussion between counsel off the record.)

MR. WOBBROCK: Your Honor, I think the matter --

MR. PHILLIPS: Let me finish my point.

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I'm sorry.

As far as we understand, and based on what Mr. Watkins told me when I introduced the subject to the Court, the document that the witness is referring to was a document authored by a Luchzinger. At least, that's what Mr. Watkins told me with respect to the subject I raised with the Court on what the witness told us about when we were back in Seattle.

So I think we have less than clarity whether he's even talking about this document, Your Honor. In fact, all the evidence from his testimony suggested something else.

MR. WOBBROCK: Are they saying point blank they didn't give him this document, Judge?

MR. PHILLIPS: I'm saying point blank I didn't give him the document. I would like to confirm he wasn't given it by someone else. But so far the testimony that we've had doesn't suggest that it was and talks about another document, Mr. Wobbrock.

MR. WOBBROCK: Your Honor, I think we need to get to the bottom of it. Two things: If you get counsel's representation that they didn't give it to him, then let's get the

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witness in here, and I'll ask him if that's the document he's referring to and ask Miss Murphy to be the one to go get him.

MR. PHILLIPS: I would like to have an opportunity to ask him some questions as well, because I know that counsel is asking questions with a purpose here, Your Honor.

THE COURT: All right. You will have the opportunity to ask questions.

MR. WOBBROCK: And Mr. Watkins should be excluded, Your Honor, since he's in the middle of it. Let's have Miss Murphy get the witness.

THE COURT: All right. We'll ask Mr. Watkins to step out.

MR. WOBBROCK: Welcome back, Doctor.

THE WITNESS: Thank you.

THE COURT: All right. Counsel, proceed, please.

EXAMINATION IN AID OF OBJECTION

BY MR. WOBBROCK:

Q Doctor, is this the document that you previously referred to that you have recently become

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aware of?
A No.
Q The document that you previously became aware of, describe it, would you, for me?
A It was a biological test that included at least two -- although there may have been three -- Philip Morris commercial cigarettes. One of the authors or one of the prominent names was Luchzinger, L-U-C-H-Z-I-N-G-E-R, something like that, maybe more phonetic than anything else. It tested Marlboro 85's, five millimeter, and then cigarette designated Commander, which is a Philip Morris Commander, and then at least one other cigarette, maybe more, or one prototype.
It also had some biological end points. The ones that I remember were data reported for a cat, cat study, a certain kind of cat. They were looking at mucous flow in that cat. And the other was respiration in a small animal; I think a mouse.
Q Have you ever seen this document before?
A No, sir.
MR. WOBBROCK: All right. I have nothing further, Your Honor.
MR. PHILLIPS: Thank you, Your Honor.

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MR. WOBBROCK: I think we can move on.

MR. PHILLIPS: All right. Thank you. Can I -- well, I think Mr. Watkins is certainly owed an apology, frankly.

MR. WOBBROCK: I'm not giving anybody an apology.

MR. PHILLIPS: In the courtroom, you accused him --

THE COURT: Counsel, let's try to get back to sort of a realistic view of a strongly-advocated case.

The other day I was accused of not being even handed. I didn't request that anybody give the Court an apology for that very strongly-worded statement. I have been on the bench 11 years. I have never had a counsel stand up and look me in the eye and tell me I haven't been even handed in a case. And I've known some cases where that would have happened, that counsel could have had a short visit upstairs in jail upstairs. Because all I have to do is call the Sheriff down here and say, "This gentleman is in contempt of Court; take him out right this second -- not tomorrow, not next week, but right now. And I will tell

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you when to bring him down. And you know what? I don't want to see him for about a week. So maybe a week from now, I will tell you to bring him down so I can talk with him."

If I had been caught in this circumstance about five years ago, there is a strong possibility I would have responded in that manner. At this point in time, I'm more mature. I have more wisdom, and I understand individuals caught up in the stream of strong advocacy. I have been there myself, and it wouldn't be fair to say to you that when I was in those situations that I haven't made statements to a Court that could have gotten me into some hot water if the Judge had taken it a little bit different. I have been told by a Judge, "Mr. Robinson, I have heard enough from you. Sit down and shut up." And when I got the Judge to that point, I was wise enough to sit down and shut up. So I've sort of learned my messages along the way.

We will not be presenting any apologies to anyone in this situation. We will carry on what we're doing, and we're in some very strong advocacy by both parties, and I have never been

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frightened by strong advocacy. I generally appreciate it.

MR. PHILLIPS: Well, Your Honor, let me just say I hope I can gain some wisdom and maturity through this trial and from your own remarks. And I will apologize to the extent that my own personal sense of injury interfere with my advocacy.

I did feel what I said, and I have to be honest with you on that. But I apologize to the Court to the extent my own personal feelings interfere with my advocacy.

THE COURT: Accepted, counsel.

MR. WOBBROCK: Your Honor, if I might, just a couple questions while the jury is out that I could follow up on -- and then maybe counsel wants to -- that I have forgotten, my counsel just told me.

BY MR. WOBBROCK:

Q Dr. Carchman, that article that you are referring to that mentions Doctor or Mr. Luchzinger, the cat mucous flow article, that is something you looked at in preparation for your testimony today?

A I looked at?

Q Yes.

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A I wasn't prepared to talk about it.
Q No, but you have looked at it in connection with this case, correct, sir?
A I have looked at it, not necessarily with --
Q You looked at it recently, sir?
A That's correct.
Q Do you have it?
A No.
Q Does your counsel have it?
A I have no idea.
Q When did you last see it?
A Last week when I was at the institute.
Q Was this a document that Mr. Watkins sent you up in Seattle?
A No.
Q Did he send it to you from Seattle?
A Mr. Watkins?
Q He's a lawyer connected with Mr. Phillips.
A I know. Mr. Watkins, I don't believe, has ever sent me anything.
Q Well, okay. Just a second. Did you send it to Mr. Watkins?
A No. If I might, maybe I could --
Q We need the document.

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MR. PHILLIPS: It may be on the exhibit list. We can inquire of Mr. Watkins may be the easiest way.

A I was at INBIFO last week, and I brought the document with me to ask one of my colleagues there if he had ever seen this before or if he knew of it. And this is a fellow who right now is in charge of the testing at INBIFO, had been there for 30 years. This document was older than that. He said he had never heard of it, nor seen this document before either.

And I left it -- I left the document with him to look at to see if he wouldn't mind doing a little digging for me to see what, if anything, we could get out of it besides what was in it.

Where did I get it from? I got it from a pile of documents from the attorneys, a meeting I had with the attorneys weeks -- weeks ago, not specifically related to this case.

Q Where is the document now, sir?

A The document I had?

Q The document you reviewed.

A In Cologne, Germany.

Q It's in Cologne, Germany?

A Yeah. I asked them to take a look at this

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for me and do a more in-depth evaluation.

MR. PHILLIPS: Your Honor, I don't want to interfere with the examination. The document may very well be on our exhibit list, as far as I know. If it's not, I'll be happy to give the Bates stamp to Mr. Wobbrock if he want to look at it. It's simply on the web site, I'm sure.

THE COURT: We can have it faxed to us?

BY MR. WOBBROCK:

Q Can you contact someone in Cologne to fax this document to us?

A Let me see.

MR. PHILLIPS: It would be easier just to find out if the document is here and there is a Bates stamp.

MR. WOBBROCK: I think the heart of this matter goes to whether this document -- where it is and a little more about it.

A It had a Bates number on it.

MR. PHILLIPS: If I can just suggest so we can get the jury back in, Your Honor, I'm happy to ask Mr. Watkins to see if he has a copy of the document. I'm happy to produce it here in the courtroom this morning.

MR. WOBBROCK: We can get it ourselves if

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we can have some specifics. And Mr. Tauman knows about this web site much more than I do. If he could ask the Doctor some specifics, we could identity.

THE COURT: All right. You may do so, please.

BY MR. TAUMAN:

Q Let me ask a prior question. You testified, didn't you, a little bit awhile ago that you were either sent this document by a lawyer in this case or you sent this document to a lawyer in this case; did you not.

A No.

Q The transcript doesn't reflect that's what you said?

A That's not what I said. The question from Mr. Wobbrock was how did I get this document, and I indicated how I got it. He asked what did you do with this document? I was in Germany last week at a scientific meeting, and I gave it to Dr. Wolf Reininghaus, who is the general manager at INBIFO, and said, "Have you ever seen this before? Have you ever heard about the work in here?" And he said, "No."

MR. PHILLIPS: Your Honor, I need to

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interrupt here. At this point, we're just doing discovery, and we're well beyond the issue that we started and took the jury out.

Again, I don't think we should be doing discovery in the middle of exam; although, on the other hand, I would be happy to walk out right now and ask Mr. Watkins to find out if he has a copy of the document and he has a Bates stamp and will give it to Mr. Tauman.

MR. WOBBROCK: Here's the problem: Now we have got the witness telling two different stories from the witness stand, and the transcript reveals that. That's the problem.

MR. PHILLIPS: Look, we started with a completely different document, Your Honor, completely different one than the one that we're starting. Now, we're going into the document he did find, for which there is no potential implication of a violation of any court order, and now they are trying to find out what the document is. Look, I mean this witness deserves to be cross-examined and complete his testimony this morning on the issue of this other document. I'm happy to try to give them whatever information they want.

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Even though they don't deserve it, Your Honor, I'll give it to them because I want to get this witness on and off. We're now completely afield from the reason we stopped the case.

MR. WOBBROCK: Can I ask the witness be excused again, Your Honor?

THE COURT: All right. We'll excuse the witness again.

MR. PHILLIPS: In the interests of time, is it worth my time asking Mr. Watkins to see if he has a copy of the document?

MR. DUMAS: He's going to obtain a copy of the document. We already inquired, and he's going to obtain it.

MR. WOBBROCK: We're beyond that now.

Your Honor, if we could, I would ask Ms. Keating to go back and read the testimony about this document that mentions Dr. Farone. We have now heard two completely different stories from this witness. The first testimony was, "I got the document from a lawyer in this case." Now, it's, "I went to Germany, and I saw it back there. And I talked to Dr. Wolf somebody about it" -- totally different story, totally unconnected. This witness has been around. He

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knows what's going on.
MR. PHILLIPS: Your Honor, he's just not listening.
MR. WOBBROCK: Let's have Ms. Keating go back and look at the testimony of what Dr. Carchman said right before I sent the jury out, and I think it illuminates the whole issue.
MR. PHILLIPS: All right. Let me just make this point: Mr. Wobbrock is obviously listening to what he wants to listen to. What this witness just told him is that he was first shown the document in a pile of documents in a meeting with some lawyers, not necessarily in connection with this case. He took the document to Cologne, Germany because he was there for other reasons last week, and he asked someone whether or not he had ever seen the document before. He didn't say he got it in Cologne, Germany. He said he got it from some lawyers, a lineage of documents not even necessarily in relation to this case.
The testimony that he gave with respect to a document that Mr. Wobbrock thought was a different document when we had to let the jury

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go out was about the fact that he believed he had got the documents from a lawyer or -- he may even have said "a lawyer in this case."

Now, the distinction we're making is did he say a lawyer in this case and does it matter to Dr. Carchman whether it's a lawyer in this case or another group of lawyers with respect to review of documents that are general with respect to his preparation as an expert witness? That's the potential distinction that Mr. Wobbrock is trying to drive again with respect to a document which was not the document he thought it was.

What does that have to do with this witness here today? If he wants to examine him about the document that he introduced with Dr. Farone, he should. If he wants to ask a question about is there another document, this Commander document, he should, and he can find out there are two documents that show that there was whole product testing. He's entitled to do that.

He's not entitled to spend the trial here and keep a jury waiting with respect to why haven't they been able to find this other

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document yet. And whether I found the document -- let's assume I found the document, I gave it to him, what implication does that have in this case? I have never seen the document before. I didn't give it to him, but who cares? It has nothing to do with this case, Your Honor. We need to get moving here.

THE COURT: We'll try to. Counsel, do you want to try to read back --

MR. WOBBROCK: The testimony of Dr. Carchman regarding the document and the mention of Dr. Farone.

THE COURT: Let's do it. Let's try to get something moving.

MR. PHILLIPS: I can read it. I pulled it up.

MR. WOBBROCK: I would like Ms. Keating to read it, Your Honor.

MR. PHILLIPS: I have it right in front of me.

MR. WOBBROCK: I would like Ms. Keating to read it, Your Honor.

THE COURT: Ms. Keating, you may proceed, please.

THE COURT REPORTER: "QUESTION: From 1989

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until 1999, when you stopped as a full-time employee at Philip Morris, you were not aware of whole product testing for biological activity at the company, were you, sir?

ANSWER: That's correct.

QUESTION: And this 1967 incident actually came to your attention through the lawyers in this case, because Dr. Farone testified that there was a code sheet that disclosed that those tests were done in Europe; isn't that correct, sir?"

"ANSWER: I think the tests were done at the University of Richmond in Richmond, Virginia."

"QUESTION: But you found out about that because Dr. Farone testified about it in this case, and the lawyers told you about it?"

"ANSWER: I think the lawyers showed it to me. I didn't know where it came -- where Dr. Farone had put that forth."

"MR. WOBBROCK: Your Honor, I have a matter for the Court."

MR. PHILLIPS: So you have testimony from the witness saying "lawyers showed me the document" -- not the document in this Court,

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right, because that document has never been seen by the witness, not the one that was introduced by Mr. Wobbrock. Then you have by clarification, the fact that he is aware of another document which was shown to him by lawyers. Mr. Wobbrock then asked him some questions.

THE COURT: I think what he said, I think he said, "The lawyer showed it to me."

MR. PHILLIPS: It's a little ambiguous, Your Honor.

THE COURT: I'm agreeing. I'm not clear on that. I can't make a distinction between that statement and his latest statement that "I met with some lawyers, and they showed me a stack of Commanders, and on that stack of papers was this document." He could have been referring to that lawyer showing it to him. He didn't say -- from what I heard her say, he didn't say, "The lawyers in this case showed it to me." He said, "The lawyers showed it to me." Then he testified later he remember some lawyers, and the lawyers showed it to him. I interpreted that as being one and the same lawyer, the lawyer that he wet met with and the

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lawyer that showed him the stack of cases. I'm sure there are other ways of interpreting it, but that's the way I'm looking at it.

MR. PHILLIPS: I guess my point is what does that matter at this point? The concern that was raised is was the witness shown a document --

THE COURT: Right. I don't think he was shown a document from testimony in this court.

MR. PHILLIPS: And so now we're just talking about they would like to get a copy of the document.

THE COURT: It's a separate document. They have a right to have access to that document.

MR. PHILLIPS: I'm going to get it to them, but I would like to get the witness on and off this morning Your Honor.

THE COURT: All right. Let's resolve the issue we have.

MR. TAUMAN: Your Honor, the only thing is we may want to use this document with this witness. He's the one that can identity.

MR. DUMAS: The document is on its way. It's on its way.

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THE COURT: The document is its way. So let's bring the gentleman back in, and get the jury and proceed slowly.

MR. WOBBROCK: Very well, Your Honor.

(Jury in.)

THE COURT: All right, Doctor. Take the again, and we will try to resume.

Counsel for the plaintiff, you may continue your questions.

MR. WOBBROCK: Thank you, Your Honor.

BY MR. WOBBROCK:

Q Dr. Carchman, where we were then, by the time you were at Philip Morris, from; 89 to; 99 -- I got that right, sir?

A Yes, sir.

Q You were not aware of any whole product biological testing, correct?

A That's correct.

Q That's where we were. Okay, sir.

Now, in the last two to three years, there has been a change in that, correct?

A That's correct.

Q And also in the last two to three years, would you agree, sir, that these things that you and Philip Morris' lawyers talked about you have started

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to implement? Correct, sir?
A Implement in what way?
Q Well, this program of Evaluation of Prospective New Ingredients, you went through this with the jury; do you recall? Do you recall this exhibit, sir?
A Yes. This has been going on not in the last two to three years, but prior to my arrival at the company.
Q But in any event, prior to your arrival in the company, application of this kind of testing the whole products was not done?
A That's correct.
Q Okay. Now, I believe you said, sir, that you and I have no dispute on a couple things. One of them is the more tar in a cigarette, the more biological activity -- excuse me, the more tar that a smoker gets from a cigarette, the more biological activity there is. It's the dose-response relationship, correct, sir?
A That's correct.
Q That's one of the areas you and I agree on?
A Yes.
Q So if someone gets more tar from, say -- I

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think you mentioned there are cigarettes on the market that go up to even 36 milligrams of tar now, probably foreign cigarettes. You can buy them somewhere?

A That's correct.

Q That would be maybe Galloius? I didn't say that right, but a French cigarette?

A Some of the non-filtered ones, yes.

Q Non-filtered cigarette. Then they go down to, what, one milligram or thereabouts?

A That's correct.

Q Now, these ingredients that are put in the cigarettes that you mentioned are on the list of 600 ingredients -- I think we have seen that -- this is on Philip Morris web site, and are you familiar with this tobacco ingredients list?

A I have seen that, yes.

Q And this goes on for pages, and it's some 599 different, I believe, ingredients, correct, sir?

A For all -- these are the 599 ingredients that were on a composite industry list submitted to the government in 1994.

Q I'm not trying to get you to admit there is 599 separate ingredients in each cigarette. That's not what we're talking about.

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A Okay.
Q What we are talking about though, I think, is that there are 599 ingredients submitted by all of the manufacturers that they put in cigarettes and one manufacturer may use five or six in one, and one manufacturer may use five or six in another. And because it's a trade secret, they are all put in one big list so that your competitors don't know what you are using in what cigarette, right?
A Generally speaking, yes.
Q So we have got another area of agreement. We have two things we agree on.
Okay. And then you take that list, and you send it to lawyers, because the lawyers allow you to keep it secret because of the attorney-client privilege, correct?
A That's not my understanding, and maybe I'm not understanding your question. We send our list to Covington, which is a law firm. The other five companies -- I think Liggett no longer a part of that -- send their separate lists. The law firm takes those separate lists and combines it. No other company knows what the other company has put in. So the secrecy or confidentiality part of that really is to prevent the other companies, the

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competitors, from finding out what you are using. Because not every ingredient on that list is used by all of the companies. Some are and some aren't.

And so to that extent, that kind of secrecy, that kind of confidentiality is built into it.

Q That's facilitated by the lawyers.

A Right. So I guess that's the third thing we agree on.

Q And the attorney-client privilege?

A I guess.

Q Well, you know a little bit about that. You are married to a lawyer, right?

A I'm married to a wonderful woman, who, besides having to deal with me, is also a lawyer, yes.

Q And so you know about the attorney-client privilege?

A I have never talked to my wife about attorney-client privilege.

Q Getting back to the issue related to that list, what you have told this jury that you previously said there are maybe six dozen carcinogens shown in animals studies, maybe a dozen carcinogens shown in human studies. No one knows

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which and in which combination cause cancer in people, correct?

A Yes.

Q And those ingredients are in whole products -- at least some of them -- marketed by Philip Morris, correct?

A Yes, sir.

Q And those whole products, from 1989 to 1999, were never tested for biological activity, at least during the period of time you were at Philip Morris?

A By Philip Morris, that's true. But if I might, there have been two peer reviewed -- two publications that have examined biological activity of commercial products in the United States, including Philip Morris' products. And then there is an older -- an older publication in 1975 that looked at the biological activity of commercial products around the world. But neither of those three studies were performed by or for Philip Morris, even though at least two of them and maybe the third actually evaluated commercial or what you like me to call whole products.

Q One of those was done by a competitor?

A Two.

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Q Two?
A Two we are.
Q Have you looked at those?
A Yes.
Q Have you relied upon it?
A I relied upon them to the -- to the extent that they provide factual information to base some conclusions on.

But in addition, we have taken that work that was published and extended it. And some of that work I presented to the jury yesterday. Some of that work is being presented at the Society of Toxicology meeting next week in the United States.

Q You thought the work by your competitors was good enough for that purpose for you to use?
A It was -- it was good enough to -- to the extent that it demonstrated several things that seemed logical, at least -- at least to me. But it wasn't good enough, because we ended up extending the work. We pushed the envelope on what they had done just to make sure that our level of comfort was -- was sufficient.
Q Doctor, do you remember when I showed you these documents yesterday about the reverse

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engineering of the Marlboro cigarette and the conclusions that they reached about ammonia? And you said that you hadn't really looked at them or relied upon them. Do you remember when I showed you those?

A You showed me those documents, yes.

Q Do you remember your testimony about those, sir?

A I think so.

Q And you said you hadn't looked at them or relied upon them, correct?

A That's right.

Q So if I have this straight, the biological testing by your competitors is good enough for you to rely upon and attribute at least some credence to, but the reverse engineering of the Marlboro cigarette that shows that ammonia is used in the cigarette and that is one of its major differences from your competitor's product is not reliable for you; is that correct, sir?

A Yes, it's not reliable. To the extent that you are dealing with information that has never been put under peer-review scrutiny or published in the literature. Either in a peer-review journal or even in a chapter, I would say that diminishes its

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scientific importance. It doesn't eliminate its scientific importance. I'm not saying peer review is the be all, end all. But clearly it is a scientific threshold that you would like to achieve.

For the two publications I'm referring to, they were published in two of the most premier scientific journals in the area. And we -- we then, as I said and you repeated correctly, I put some reliance on them. I didn't -- as the words you used -- authoritative -- they provided some important information.

We then went to work, ourselves, and examined it in a more thorough fashion. Based upon those facts, the points of peer review, publication, quality journal and the fact that we were able to repeat it and extend it, it strengthened in my mind the value of that information.

The material in this document, which I have not -- I have not reviewed, nor do I have any desire to do so, really, at this point -- unless somebody compels me to do it -- does not fall in my mind in the realm of serious scientific investigation.

Q And it also means, if you tell this jury that you haven't looked at it, that I can't ask you

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very many questions about it? Doesn't it also mean that, Doctor?

A Sir, I am not a lawyer. If you want me to look at it and then you want to ask me questions at some point in the future, I would consider it. I have not read it to avoid any questions from anybody.

I am not into stirring through other peoples garbage to come up with points that don't find themselves in a peer reviewed scientific situation.

Q Let's do that, Doctor. Let's look at these documents, as you offered.

MR. PHILLIPS: Your Honor, I believe the Court has addressed this question at least twice with counsel and has instructed him that hypothetical questions are fine in this area, but no reading these documents.

MR. WOBBROCK: The Doctor has offered to now, Your Honor.

THE WITNESS: I have offered at some point to do that. If you took that to mean right now, then let me clarify.

At some point I will. Right now, to go through and read those documents, will take me

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several hours, if not a day, to read and evaluate. Anything less than that would not be fair to either me or you, the Judge, or the jury.

MR. WOBBROCK: I think the jury will judge the fairness of the courtroom, Your Honor. We'll leave that to them, okay.

MR. PHILLIPS: Your Honor -- excuse me, Mr. Wobbrock. I apologize. I just need to have some guidance about the Court's application of the rules with respect to what Mr. Wobbrock is doing.

THE COURT: All right. Counsel, let us move so. Do you have a hypothetical for the Doctor? Proceed with them.

BY MR. WOBBROCK:

Q I would like you to look at this document from Brown and Williamson and its analysis of a Marlboro 85 versus a Merit. Are you willing to do that?

A Look at it? I can look at it.

Q It's not going to take you hours to look at basically a three-page document, is it?

A To look at it? No. To understand it, to be able to evaluate it, understand it, I don't know

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until I look at it.
Q Okay.
A Thank you. Would you like me to do that right now?
Q Yes, please.
MR. PHILLIPS: Your Honor, may I ask a question in aid of my objection at this point while the witness read this?
THE COURT: You may, counsel.
BY MR. PHILLIPS:
Q Dr. Carchman, if I can pull you out of that document for a second? Have you ever seen that document before?
A Yesterday, Mr. Wobbrock tried to show this to me, and I indicated I had not seen it before.
Q It's a document from another company altogether, is it?
A I believe so.
Q Have you ever seen that document or are aware of any such document in the files of Philip Morris at any time while you were employed there?
A Like I said, I never saw this before.
MR. PHILLIPS: I renew my objection, Your Honor, and think that counsel should move on.
(Pause.)

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THE COURT: Doctor, did you glance through it briefly?

THE WITNESS: Yes, I have looked through it. This is a summary report that doesn't provide specific information as to what they did, how they did it and how they measured what they did. In the absence of having fundamental scientific information on what they used to measure these things, I have no way of evaluating these numbers.

For measuring smoke pH, there must be a dozen methodologies, all of which are different, all of which give different results, and all of which have been reasonably criticized by people outside of the industry. Without having that kind of information, these are just numbers.

Q Here's the problem --

A They don't meet -- excuse me, sir.

Q Excuse me, Doctor. Here's the problem --

MR. PHILLIPS: Excuse me, wait.

Excuse me, Your Honor -- Your Honor, the witness was talking.

MR. WOBBROCK: He wasn't answering a question. I understand the rules of court,

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Your Honor, is that I pose the question, the witness responds, and then counsel can object one way or another. But the way we don't operate is for the witness to give speeches.

MR. PHILLIPS: The Court asked the witness to explain, and I believe he was explaining. The witness should have the privilege of completing his response.

THE COURT: Let him complete his responsible, counsel.

Doctor, complete your responsible.

THE WITNESS: Thank you, Your Honor. There is no way for a scientist to look at these numbers and put any value or weight on them in the absence of having a description of the methodology that was used to determine these values.

Q Are you willing to respond to any questions about this document, Doctor?

A Well, to the extent that you understood what I said in terms of these numbers not meaning anything to me in the absence of the methodology, if your questions relate to what these numbers may or may not show, I -- there is not enough information for me to say I agree or disagree or I know what

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these numbers represent.

Q Well, let me ask the question. You can tell the jury how you want to respond. This shows a comparison, does it not, in the total nicotine delivery?

MR. PHILLIPS: Objection, Your Honor. I'm sorry. I apologize to Mr. Wobbrock. But Your Honor has given counsel specific instructions about not describing this document, which is not a Philip Morris document, to any witness. This witness has responded on three occasions, and the Court has instructed counsel to. If he's going to ask any questions, to do hypotheticals. He's already done it, and this is asked and answered and cumulative and he's wasting our time.

MR. WOBBROCK: Your Honor, this witness offered to look at these documents about five minutes ago, and that's what I've taken him up on in his offer.

THE COURT: What I must do, counsel, I can't let the witness change the rules of court. The Court's ruling is you ask him hypothetical questions about that document only.

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BY MR. WOBBROCK:
Q Dr. Carchman, assume this document here says that the Marlboro 85 was compared to the Merit, and the smoke pH of the Marlboro 85 was 5.9, and the Merit was 6.4. Can you assume that, sir, from this document?
A I assume that's what those numbers say, yes. I don't have to assume it. That's what those numbers say.
Q The percentage of free nicotine is shown as 28.7 for the Marlboro 85, and the lineage of free nicotine for the Merit is a 50. Do you assume that?
A No. That's what the numbers say.
Q That's what the numbers say. Okay.
The milligrams of free nicotine for the Marlboro 85 are 33 and for a Merit -- point 33 and for a Merit .32, correct sir?
A That's what it says.
Q Now, the other document I take it, sir, you think is too long to evaluate to respond to questions?
A I think any reasonable person looking at a document like that would say if you want me to do a responsible job, then give me the necessary time to do it. Without taking a look at it, I couldn't tell

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you how long it would take.
Q And just so we understand, this is a reverse engineering document that --
MR. PHILLIPS: Your Honor, I'm sorry. Again, either I'm not understanding the Court's ruling. These documents are not in evidence. The Court has excluded them. The Court has instructed counsel repeatedly if he wants to ask hypothetical questions in general, he can. And what he's doing is just reading documents that the jury is not going to have and which the Court has deemed inappropriate for the jury to have in front of this witness.
I think the counsel should be instructed to move on.
MR. WOBBROCK: Just a couple more questions on this.
THE COURT: Are they hypothetical questions, counsel?
MR. WOBBROCK: They are not, but I just want to make sure, just a fact.
BY MR. WOBBROCK:
Q You are telling this jury that this analysis by your company's competitor of your company's product you have never looked at.

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A I think for the second or third time, my answer is yes.
Q You mentioned smoking panels, sir. Smoking panels are people that are smoking cigarettes that you are now going to evaluate how those cigarettes affect them?
A In what context are we talking?
Q In your direct testimony, I think you testified that you are starting a program in which you are going to take the whole product or the marketed product or the product sold in the grocery store, however you want to call it, and you are going to have people smoke them?
A That's well under way. And I wouldn't -- I don't think I described them as panels. The smoking panels, I believe I was referring to, had to do with the acceptability aspects of harm-reduced products.

The studies that we have -- that we have under way now are with outside people who smoke. This is done in clinical and contract research facilities around the country. I don't believe I ever referred to them as panels.
Q I wrote down the term "smoking panels". The jury will remember whatever you mentioned.

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A Okay.
Q But the issue is this, sir: You have those people, before they begin to smoke these products, sign releases and acknowledgements of the risks that they are taking smoking these products, don't you, sir?
A That -- that could very well be. I really don't know.
These studies are all done following a review by a human subjects panel, ethical review. So if that's what is legally and morally ethically required, that's what's done.
But I was never involved in the contractual pieces other than to know that this had an IRB -- what's called an IRB review for each of these studies.
Q Until the last two or three years, you have never tested a marketed over-the-counter cigarette, a whole product, for example, to see if one cigarette had more nitrosamines than another, have you?
A I don't belief so.
Q Has Philip Morris ever followed up with consumers of your product, who were soldiers in World War II, who were given free cigarettes during

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the war or Vietnam war, who were given free cigarettes or the Korean war? Have they ever gone to the Veteran's Administration Hospitals to follow up with those fellows to see how they are doing, whether they developed lung cancer, heart disease from your products? Have you ever done that?

A Not that I am aware of.

Q Philip Morris ever followed up with its customers in any way to see if they have ever become addicted to the product?

A Uhm, not that I am aware of.

Q Philip Morris ever tried to determine if smokers of Merits are addicted more or less than smokers to any of its other products?

A I haven't seen any such data.

Q Philip Morris ever studied whether its low-tar cigarettes -- until the last two or three years with this new stuff that you have come up with -- the low-tar cigarettes it makes causes fewer lung cancers?

A Other than evaluating the published literature and going to scientific meetings in which these are reported, no.

Q The Frank Statement again, Exhibit 6, what we talked about yesterday, "we accept an interest in

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people as a basic response paramount to every other consideration in our business."

Having reviewed the documents that you said you reviewed when you came to work at Philip Morris, do you think, Dr. Wakeham, Dr. Seligman, Dr. Osdene and Dr. Dunn were true to that promise?

A Putting Dr. Dunn aside for a moment, the only person that I knew personally and well enough -- of the four you mentioned -- is Dr. Osdene. And my interactions with Dr. Osdene basically confirmed to me that he was one of the senior scientists that had an involvement in lots of things, and both things that I'm proud of and things that I don't understand.

And one of the things that I was proud of, and I'm still proud of, is the work that he was involved in with respect to reduced-harm products. The only thing I can say about Dunn and Dr. Wakeham and Dr. Seligman could only be reflected from the documents that I have read that they have written.

And Dr. Dunn I have very strong feelings about, none of which are generally pretty positive.

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Dr. Wakeham, in terms of some of his documents, he has said some things that sort of raise my eyebrows from time to time. But as a scientist, he has said some things also, I think, that were very, very important.

So in terms of an interest in what the company was doing and trying to do with regard to its products, with this kind of product, I think at least for three of the four, only one based on -- bless you -- one based on personal interaction and the others through documents, I can find in myself a strong feeling that at least three of these four guys had their head in the right place in terms of trying to develop a lower risk, lower risk product.

I wish we could have accomplished more, but I think we have done -- to me, it's a very complex and task. I think we have made some progress. We have gone down some blind holes from time to time. But I think we're moving in the right direction.

And when you refer to the evaluations we're doing now with commercial products in people, it had nothing to do, in my opinion, with the Master Settlement Agreement.

It had everything to do with the

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Institute of Medicine report. And we have adopted their principles. We're doing these studies. We're presenting this data. We're sharing this information with some of the peoples whose names you mentioned to me earlier and asking them for feedback about what are we doing, can we do it better? Are we looking at this incorrectly?

So I would say, at least as far as I'm concerned, there are elements that I have seen and I continue to see that make me feel comfortable. Am I content? No. Can we continue to do better? Yes.

Q You have reservations about Dr. Dunn, in other words?

A Oh, sure.

Q Did you know Dr. Dunn?

A Never met him.

Q But you have expressed opinions about the other three individuals, Osdene, Seligman and Wakeham, those doctors?

A Yes.

Q But at least as of March 16th of 1999, you didn't have an opinion, did you?

A An opinion on what?

Q What I just asked you?

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A I don't know.
Q Well, let's read what you said then. "And there were people who -- Osdene, Wakeham, Dunn, they were doing what they felt they needed to do to discharge what I call the promise. "We accept an interest in people's health -- quote, we accept an interest in people's health as a basic responsibility paramount to every other consideration of our business -- in our business? "Answer: I can't speak for anyone other than me, particularly people that I don't know. I did not know Dr. Dunn. I met Dr. Wakeham once. I knew Dr. Osdene, but not as he was performing scientific activities at the company." Do you recall that question, that answer?
A I don't recall it, but I wouldn't be surprised if that's what I said, yes.
MR. PHILLIPS: Page and line, counsel.
MR. WOBBROCK: 72.
A My answer doesn't seem to be inconsistent with my statement that -- my expression about Dr. Wakeham and Dr. Seligman were derived from things that they wrote.
Q I don't believe I just asked you a question, sir.

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A I'm sorry.
Q Now, the R&D budget from '69 to '94, you are familiar with that; are you not?
A Not in these specific terms, no.
Q Are you familiar with what the R&D budget was when you were there?
A Generally speaking, yes.
Q And you knew that to be about what, twenty million dollars a year?
A $150 million, $120 million. That's my recollection.
Q Well, in fact, the amount spent from '64 to '94 on R&D was about five percent of the amount spent for advertising; was it not?
A I don't know.
Q You don't know that?
A No, I don't.
Q Let me read you this question and answer, page 70, Williams: "Okay. That's all I wanted to deal with, that in terms of R&D, you were high enough in R&D that you know R&D in the last 20 years like '69 to '94, R&D has actually gotten about five percent of the money that Philip Morris has spent on advertising; isn't that right? Answer: That could be very well. I have not tracked what they spent on

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advertising. I have some idea what they spent in our last -- our R&D function. Question: I think I made a mistake. Let me try it again. At five percent, five percent of the -- now, let me try it again. Sorry, sorry. I did this before in opening statement. Let me try telling you what I see as your recollection. The number I have for the ratio of R&D to advertising -- and by advertising, marketing advertising promotion -- is R&D one billion, 230 million versus 18 billion, 74 million, kind of an one to 25 percent, basically, ratio; does that sound about right? Answer: I think that is consistent. I haven't analyzed that in detail. But it is consistent with some numbers I have heard." Do you recall that testimony?

A Not specifically. But again, it sounds to me what I said then, I wasn't that familiar with it, but if those are the numbers that were there, that's what was said.

Q The newer research that you are doing, sir, that's the $20 million; is it not?

A If you mean the external research program, which is -- if that's what you are referring to?

Q Yes.

A Okay. That is in addition to the R&D.

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That -- separate from the R&D budget.
Q That's twenty million dollars.
A Well, that's what has been funded per year so far. This is only the second year of that program.
Q When we heard from the economist, we heard that your company is making about a hundred million dollars a week. Does that sound about right?
A Well, I guess I have to be very careful, because this might come pack in some other trial. I don't know.
Q Well, assuming that to be true, because that testimony was previously given, this $20 million then would be about a day and a half profit; would it not?
A Okay.
Q Let's see if we can find another area of agreement. Let's see if we can agree on what the concept of compensation is, not whether how long it lasts, whether it's complete, and all that, just the concept.
So we'll talk about three cigarettes, 24-milligram tar cigarette. We call this a -- say a high-yield cigarette, would that be fair?
A Okay.

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Q And one-and-a-half milligrams of nicotine, would that be in the category of a high-yield cigarette?
A In today's market, it's a high yield.
Q That's what I'm talking about today?
A Probably a non-filtered cigarette.
Q And then I'm just trying to use round numbers. Talk about a 16-milligram tar and a one milligram nicotine, and that would be sort of a medium?
A We would call it a full flavor.
Q Full flavor. Okay.
And then if we talk about an eight-milligram tar and a .5-milligram nicotine, we would call that a -- in the terms that are used in the marketplace, a low-tar cigarette?
A Light.
Q Light cigarette. And this would actually be the figures very close to a Merit. These numbers because of the rounding vary slightly from year to year.
A I agree.
Q So we call this a Merit, is that okay?
A Yes, sir.
Q That seem to correspond correctly?

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A It's close enough, yes.
Q And we'll call this one a Benson & Hedges, because that's the numbers I think we had for that cigarette at that time; is that correct?
A I think that's correct.
Q Then this 24-milligram, we'll call it high yield; is that a fair --
A Okay.
Q All right. So that the concept of compensation -- I just want to see if we have this agreement here, so we're talking about the same thing -- would be that if someone were to regularly smoke a Benson & Hedges and then they went to a higher-yield cigarette, because they were used to the amount that came from the Benson & Hedges, they probably wouldn't smoke the higher-yield cigarette as hard. They wouldn't puff on it as hard. They wouldn't inhale it as much or use the cigarette, puff on it so frequently. They would try and get about the same amount of nicotine and tar they got from the Benson & Hedges from the higher yield cigarette. That's the concept of compensation, correct?
A It's consistent with it, yes.
Q So when you go up from a lesser-yield

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cigarette, you kind of back off; fair to say?
A Yes, that can happen.
Q And then the concept -- just the concept now of compensation -- is when you go down, you do just the opposite; you smoke it a little harder. So if you went from a Benson & Hedges to a Merit, the concept of compensation is that you draw on this harder, you inhale it deeper and you smoke it more frequently -- I should say you puff on it more frequently, so you equal out basically what you have gotten from the cigarette that you are used to, if this is your regular brand? That's the concept of compensation?
A That is a component of that concept.
Q So in other words, if you are the middle-range smoker, when you smoke either of these cigarettes, you either back off on the higher one or you work a little harder on the lower one to try to get you to where you are used to?
A That's the concept.
Q That's point three of our agreement, I think. I don't know if we can agree on that.
A No, no.
Q We have got three areas of agreement.
A In terms of the concept, I agree with you.

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Q And would you agree -- or you don't disagree with Dr. Benowitz, do you, that most smokers don't know about this?
A Don't know?
Q About compensation?
A Well, they may not know the term, but do most smokers know when they smoke different kinds of cigarettes they smoke them differently? I have no scientific knowledge personally to answer -- answer that question, but I believe that most smokers when they smoke different kinds of cigarettes recognize most of the time that they are smoking them differently and/or they are smoking more of them or less of them.
Q So without any data, you are willing to venture an opinion?
A No, I didn't say that. What I said was in the absence of me personally having data, it wouldn't surprise me. Okay. And again I very to be very specific, I guess. Surprise -- wouldn't surprise me -- is not me giving you a scientific opinion. I have no scientific data that would allow me to make a scientific opinion on this.
Q Well, let me read you what you said under a prior situation under oath. This is Bowken(ph)

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4828. Dr. Benowitz's testimony here on April 6th, I'm going to read it to you and ask you a few questions. "Limitations on the FTC method haven't been a secret for over 30 years, if ever?" His answer: "Not a secret to the FTC. I think most smokers have not been made aware of that. Most smokers think that low-yield cigarettes are less hazardous. Most smokers don't realize that you can smoke --

A Excuse me, this is Dr. Benowitz?

Q Yes. And then there is a question to you.

A Okay.

Q "Most smokers don't realize that you can smoke the lowest-yield cigarette to the highest-yield cigarette with a ten percent difference in exposure maybe, so very little exposure, which is what you see if you are a heavy smoker. Smokers have never been told what to do to avoid compensation. So whereas scientists know about that and the government knows about that, smokers do not know about compensation, in general. And I think they should have, because they are the ones whose behavior needs to be adjusted if they really want cigarettes to be less hazardous. Do you agree with any of that?" "Answer: -- this is your

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answer -- "Well, in general, I don't disagree with it in terms of what the consumer knows or doesn't know about low-tar cigarettes and FTC. I'm not competent to address that.

A Okay.

MR. PHILLIPS: Excuse me, Your Honor, for purposes of impeachment, there is a question that follows it, Your Honor, rather than reading other testimony in the case to the jury.

THE COURT: Counsel, you have a question?

MR. WOBBROCK: Well, my question was: Did you give that testimony? I thought he said yes?

MR. DUMAS: Your Honor, that should be stricken. That is improper use of deposition testimony. It's exactly what the Doctor just testified to. There was no impeachment there. Mr. Wobbrock knows it. He just read the question because he liked the question.

MR. WOBBROCK: I don't belief so, Your Honor.

THE COURT: Let's move on, please. Please, please.

MR. WOBBROCK: Thank you.

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BY MR. WOBBROCK:

Q The document that your company's lawyer showed you earlier, this is Exhibit 1,004. This is, for the record, the changing cigarettes -- I'm sorry. -- The Changing Cigarette, a Report of the Surgeon General, 1981. You are familiar with that?

A Yes, sir.

Q And you answered some questions with the company's lawyer when he asked you about this. And this is page 54. "The effects of smoking machine parameters on relative and absolute yields of smoke components from various types of cigarettes: Smoking machine assays of cigarettes fulfill two needs. The FTC ratings for tar and nicotine yields measure an implied risk to the smoker." Do you recall the question being asked about this earlier?

A I remember the sentence. At this point, if you have a question about --

Q I'm going to ask you now, sir. I just want to know if you recalled that was my first question.

The implied risk here would be the lower the tar, the lower the risk?

A That would be -- that's my understanding as well.

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Q And the higher the tar, the higher the risk?
A As well, my understanding.
Q I think that's point four of our agreement.
Would you agree, sir, that the public health community, when expressing their concerns about smoking and health and expressing their concerns publicly that they knew the industry would hear, that they wanted a low-tar cigarette that would provide low tar to the smoker, not just to the FTC machine?
A Of course.
Q Point five of our agreement.
Now, your company or any company is not required to use the term "low tar", are they?
A I don't know.
Q You don't know that?
A I don't know. I know there is a relationship between what the FTC allows with regard to descriptors, but -- and they have defined in some way those descriptors. But to say they are allowed, I think you should be asking the lawyer and not a scientist.
Q Well, do you know who Ms. Lund is who

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testified in this case earlier?
A Nancy Lund.
Q Nancy Lund, vice-president of marketing?
A Yes.
Q When I asked her -- I'll just ask you to assume this. I asked her if the company was required to use the term low tar, and she said no. Do you disagree with that?
A No. She's in marketing. Marketing is regulated by the Federal Trade Commission. So I would be shocked if she was not aware of what the requirements are.
I'm scientist from R&D, not an area I have ever stepped into, and nor do I think I want to.
Q But you did earlier testify about a whole bunch of documents about the FTC regulations concerning the use of the term "low tar"; did you not?
A As it relates to the testing procedures and the importance of the testing procedures, the technical scientific aspects of the FTC procedures.
Q And one of the documents that you testified about was a document that said when you could use the term -- not you, sir, but your

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company -- could use the term "low tar". Do you recall that?

A Yes. I remember that section, yes.

Q And do you recall any place in that document that it said you must use the term "low tar"?

A I don't recall one way or the other.

Q Okay. So we could go back and probably rely upon what vice-president Ms. Lund said?

A If that's what you want to do.

Q I'm asking you if you think she would be competent to give us an opinion in that area?

A As the head of marketing, I believe she would.

Q In fact, sir, your company likes the use of the FTC method or liked it in the past because it gave them low numbers; isn't that true, sir?

A What do you mean, liked the FTC test because it gave low numbers?

Q Yes.

A The test is the test. The numbers you get from the test are whatever the numbers you get using standardized -- if you have products that have low numbers on that test, that's a fact.

Q But it's also something that the company

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likes, isn't it?
A If you are trying to sell lower-delivery products and you are following a standardized government test that gives you lower numbers, I would say you like the fact that what your folks have designed and engineered meets a standard government test.
Q Are you familiar with this document, No. 465? March 1st, 1974? Have you seen this before, sir? It's in evidence.
A I don't know. I would have to look at it. I can't read it on the screen.
Q Disregard my comments. They are not part of the original document, that scribbling on there that is in red.
A Okay, I'll ignore the scribbling.
I may have seen this, this document. It doesn't jump -- it doesn't jump out at me, but I may have seen it.
Q Is it not true, sir, that the conclusion of this -- well, before we get there, generally people smoke in such a way that they get much more than predicted by machine -- this is especially true for dilution cigarettes. Would you agree with that?
A In 19 -- in 1974, I think that's true.

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Q And dilution cigarettes would be more applicable to this eight-milligram Merit-type cigarette than it would be to this other two brands here?

A No. The 16 and the eight are both diluted. The eight more than the 16. The 24 probably has little or no dilution.

Q I didn't mean to say that the 16 didn't have any dilution, but the eight would be the more diluted than the 16?

A So we agree.

Q We agree again. Number six, I think.

So what this says is the more diluted the cigarette, they get much more than predicted by the machine?

A That's not what --

Q That's not what it says?

A It says generally. It said this is especially true for dilution of cigarettes, and I would answer it in the following way: That given this argument, if you block the ventilation holes on the eight-milligram product, you would get more tar coming out than if you blocked the holes on the 16-milligram product.

So if you are talking about

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ventilation, then we're talking about primarily hole blockage. So if you block the holes, you would have a bigger impact on the eight than on the 16.

If you smoked more -- smoked twice as many eight's, then you would get more tar. If you took bigger puffs or more frequent puffs on the eight, you would get more tar; the same with the 16.

But when you are talking -- if you are focusing -- if I understand the question, you are focusing on ventilation, then you are talking about hole -- primarily hole blockage and the mechanism to do it. That works to some degree with these cigarettes, but you need to occlude the holes.

Q Let's talk about that for a second. I want you to assume it was testified in to in this courtroom by Dr. Benowitz that the high-ventilation cigarettes like the Merits -- higher, I should say. I know there are others that are higher, correct?

A Yes.

Q The higher-ventilation cigarettes like the Merits can be -- their dilution characteristics can be defeated by the smoker drawing harder on the cigarette. Do you agree with that?

A That's true for pretty much all -- all cigarettes.

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Q Good. Number seven we agree on.
And here we go then to the conclusions, "The FTC standardized test should be retained because it gives low numbers"?
A That's what it says.
Q And as Philip Morris' lawyer has pointed out and will probably point out again, it permits comparison between brands. We don't dispute that. So those are two factors that this author, Dr. Wakeham, thought were in favor of retaining the FTC test, correct?
A Well, it also agrees with Philip Morris' statements that were submitted to the FTC and printed by the FTC that people don't smoke like machines.
Q And Philip Morris has commented to the FTC, despite what you just said, that this test, the FTC measures, should be kept; have they not?
A Yes. Actually, I think the main point is there should be some test for the consumer to use. If there is a better scientific test, I don't believe Philip Morris would object to that.
If the purpose of the test has changed, then Philip Morris, I believe, would agree to a change in that test if it was scientifically

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based.
Q Well, the question is this, sir: The current test, Philip Morris has commented to the FTC in the formal commenting process that the current test should remain the same; have they not?
A They have.
Q Philip Morris' lawyer, Mr. Phillips, showed the jury Exhibit 768, which was a press release, and asked you a few questions about it. It announced in 1967 this test we have just been talking about. Are you familiar with that?
A Yes.
Q I'm going to leave it here for a few minutes.
Let me ask you this, sir: Do you think Michelle Schwarz ever saw that?
A I don't know, sir.
Q This FTC rating you likened to an EPA evaluation of a car, did you not?
A Gas mileage.
Q Gas mileage?
A Yes.
Q The fact is if you are a -- the analogy would be in this case if you bought a car that had a 26-mile-per-gallon rating, if the analogy to the FTC

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testing on low-tar cigarettes applied, you would never get that 26. In fact, you would get half of what you expected.

In the FTC system when people shift down to a lower-tar cigarette, they get double often what they expect; isn't that true?

A I don't believe -- I don't believe your example of the analogy is correct, either for cars or the smoker. I bought cars over the years and looked at those numbers. I don't believe I have ever gotten either the upper number or the lower -- lower number.

In terms of the FTC, it was never the expectation of the FTC that the number in the advertisement for a cigarette is what the smoker would actually get. And as we discussed -- some of us discussed yesterday, that was never the intent of the FTC in putting this -- putting this test together. And the fact that people might get different amounts -- and that would be important from a public health perspective and that the government, as well as Philip Morris, was aware of that, I believe -- and this is just a belief. This is not an opinion from an expert. It's my belief that the government felt even though -- I would, if

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I were the government -- even though this is really not what a person might get, it's still important to give them some idea from a comparative basis what might be going on.

In the absence of having that information, I think the government would have -- is having a difficult time, because when you ask me about Philip Morris' statements to the FTC, the FTC is concerned about this methodology, and they have had hearings and meetings on this. In fact, they have asked people, both in the public health community and the industry, to comment on it. The FTC has been provided a large number of comments, and they still have not changed the methodology.

They might, and if they do, we'll do whatever it is they want. But they have asked for comments over the years, but they still haven't changed it. Might they? They very well might.

Q And as we just established, Philip Morris has resisted any effort to change it and wants it to remain the same?

A I would say you can find old documents in the company that clearly point that out.

In the discussions I have been party to within the company, the feeling, the strong

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feeling is if the FTC comes up with another scientifically-based test, Philip Morris will do whatever -- whatever is -- whatever the FTC says, if it's the FTC.

Q Let's talk about this: The consumer doesn't know that though. They don't know they are going to get a different number than the machine. You would agree with that, wouldn't you, sir?

A We talked about it before. I would agree with you.

Q In fact, your company has recognized only recently, very, very recently, that exact problem and actually has done something about it, but only within the last month or two. Isn't that true?

A We're trying -- we're trying to do something. Whether the FTC will allow it or not, I don't know.

Q Well, you are actually telling consumers now when they buy the product for the first time -- this certainly didn't help Michelle Schwarz, because it's only happened in the last couple of, months -- for the first time that the FTC machine, smoking may differ markedly from the way they use the product; isn't that true?

A The answer is yes, but it's my

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understanding when I asked that question, the FTC would not have allowed us to do this before.

Now, that is not a weighted consider -- I asked the question. That was the response I got. I understand what we're trying to do now, which the people in the company don't know if the FTC will allow that to continue.

Q So you are relating hearsay testimony again are you not, Doctor?

A Hearsay?

Q What somebody else told you that you know I can't cross-examine?

A Well, to gain my opinion, I had to ask people who were in the know about what was going on, because I think it is -- it is not unreasonable for Philip Morris to do it.

Now, for somebody, such as you, to criticize us doing it now, why didn't you do it before? That led me to say, well, why didn't we do it before? And the answer I got from somebody knowledgeable about this.

Q I don't think you should do this Doctor?

A Okay. Then I'll stop.

THE COURT: All right. Let's stop and take our morning break, counsel. Let's do

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that.
(Jury out.)
MR. PHILLIPS: I have a matter for the Court before we break.
THE COURT: All right. We'll try to do that, counsel. The witness can step down.
THE WITNESS: Thank you.
MR. PHILLIPS: Your Honor, we did identify the document that Dr. Carchman mentioned. It is Plaintiff's Exhibit 77. And now I can understand the situation. I know I gave that document to Dr. Carchman back in December. So I think they now know what document it is. It's their own document on their own list. And I gave it to Doctor -- I can remember giving him a couple of documents on their exhibit list back in December. I'm pretty sure that was one of them. So I think that is the story.
THE COURT: Very well. Let's take a break.

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STATE OF OREGON)
) ss.
County of Multnomah)

I, Estelle T. Keating, Official Court Reporter of the Circuit Court of the State of Oregon, Eleventh Judicial District, certify that I reported in stenotype the foregoing proceedings in the above-entitled case.

I further certify that my stenotype notes were reduced to transcript form by Computer-Aided Transcription under my direction.

And I further certify that pages 1 through 99 contain a full, true, and accurate record of my stenotype notes.

Dated this 8th day of March, 2002, at Portland, Oregon.

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Estelle T. Keating

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